IN THE

United States Circuit Court of Appeals,

FOURTH CIRCUIT.

No. 290.

THE BOARD OF COMMISSIONERS OF STANLEY COUNTY ET AL.,

Appellants,

vs.

W. N. COLER & COMPANY,

Appellees.

Brief of Appellees on Rehearing.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
CHARLES PRICE,
Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

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I.

The recitals in the bonds are conclusive in favor of the bona fide holder thereof, and estop the county.

The bonds recite (Record, p. 8) that they are

"*issued by authority* of an act of the General Assembly of North Carolina, ratified the third day of March, A. D. 1887, entitled 'An Act to amend the charter of the Yadkin Railroad Company,' *and of Sections 1996, 1997, 1998 and 1999 of the Code of North Carolina*, and

authorized by a majority vote of the qualified voters of Stanley county," etc.

The bonds, therefore, thus expressly recite that they are "issued by authority * * * of Sections 1996, 1997, 1998 and 1999 of the Code of North Carolina."

It is admitted by all courts and all parties that these sections of the Code of North Carolina were properly enacted by the legislature, and that the journals so show. This Code, therefore, is a valid act, which authorizes the issue of bonds under the circumstances and upon the conditions and terms therein stated.

The precise proposition that we now state is this: that whatever be those circumstances and conditions, whether the railroad in aid of which the bonds are to be issued must have been an unfinished road at the time of the adoption of the constitution, or at the time of the passage of the act of April 10, 1869 (which afterwards became Sections 1996 *et seq.* of the Code), or whether the citizens of the county must have had an interest in the road—in short, whatever may have been the conditions required by the said Code to exist in order to authorize the issue of bonds thereunder—the said express recital in these bonds is conclusive in favor of the *bone fide* holder of these bonds, that all those conditions existed which were required by the said sections of the Code to exist precedent to the issue of the bonds.

This precise proposition has been repeatedly determined by the Supreme Court of the United States. We need refer only to a single case; namely, *Evansville vs. Dennett*, 161 U. S., 434. In that case there were two sets of bonds involved. The bonds issued to the Evansville, Carmi and Paducah Railroad Company recited that they were issued

"by virtue of an act of the general assembly of the State of Indiana, entitled 'An act granting to the citizens of the town of Evansville, in the county of Vanderburg, a city charter,' approved January 27, 1847; and, by virtue of an act of the general assembly of the State of Indiana, amendatory of said act, approved March 11, 1867, conferring upon the city council of said city power to take stock in any company," etc.

With reference to the act of March 11, 1867, the Supreme Court of the United States said (p. 439):

"It is certified to us that, under the decision of the Surpeme Court of the State of Indiana, this latter act [March 11, 1867] was invalid, because amendatory of a prior invalid act.

"The bonds in question, of both series, were in fact issued in attempted compliance with the act of March 11, 1867, referred to in the recitals in the bonds issued to the Evansville, Carmi and Paducah Railroad Company.

"The ordinances of the city council of the city of Evansville authorizing the issue of both series of bonds disclose that they were issued pursuant to an election by the legal voters of the city of Evansville, but do not recite that any petition of resident freeholders of the city was presented to the common council, as required by the charter; and *no such petition was, in fact, in either case made or presented to the common council of city of Evansville.*"

That case, therefore, was precisely like the present case in this, to wit, the bonds recited two acts, one the act of March 11, 1867, which was invalid, the other the charter of the city of Evansville, which was valid. The charter of the city of Evansville gave authority to issue bonds on certain conditions. The provisions of the charter of the city of Evansville, however, were not complied with. The bonds, however, recited that they were issued "by virtue of" the city charter; *i. e.*, the act approved January 27, 1847.

On this state of facts the United States Circuit Court of Appeals for the Seventh Circuit, certified to

the Supreme Court of the United States, among others, the following questions (161 U. S., 440):

"3. Do the recitals in the bonds issued to the Evansville, Carmi and Paducah Railroad Company, as against a *bona fide* purchaser for value of such bonds, estop the City of Evansville from asserting that such bonds were not issued, for stock subscribed, upon a petition of two-thirds of the resident freeholders of the city, distinctly setting forth the Company in which stock was to be taken, and the number and amount of shares to be subscribed? [Yes].

"4. Under the recitals in the bonds issued to the Evansville, Carmi and Paducah Railroad Company was a *bona fide* purchaser for value put upon inquiry to ascertain whether a proper petition of two-thirds of the residents of Evansville, freeholders of that city had been presented to the Common Council before that body had subscribed for stock in the said railroad company? [No].

"5. Was a *bona fide* purchaser for value of the bonds issued to the Evansville, Carmi and Paducah Railroad Company charged by the recitals in said bonds with notice that they were issued in pursuance of an invalid act, and in pursuance of an election under it [No], or **had such a purchaser a right to assume, from the recital, that the prerequisites of both the valid act and the invalid act had been observed by the Common Council before the issuance of such bonds? [Yes].**

Note the precise question presented to the Supreme Court of the United States in the case of *Evansville vs. Dennett* under said certified question No. 5, above quoted, was whether the purchaser had a right to assume from the recital that the prerequisites of both the valid act, namely, the charter of the city, and the invalid act, namely, the act of March 11, 1867, had been observed by the common council before the issuance of the bonds, this question being the latter half of question No. 5. The Supreme Court of the United States answered "Yes." We will not quote here the entire language of the case. It is enough here to re-

peat the quotation made by Mr. Justice HARLAN in giving the opinion. He says (p. 442), quoting from *School District vs. Stone*, 106 U. S., 183, 187:

"'Numerous cases have been determined in this court, in which we have said that, where a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, or for other like purposes, and imposes upon certain officers, invested with authority to determine whether such conditions have been performed, the responsibility of issuing them when such conditions have been complied with, recitals by such officers that the bonds have been issued 'in pursuance of' or 'in conformity with,' or 'by virtue of' or 'by authority of' the statute, have been held in favor of *bona fide* purchasers for value to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued (*Town of Coloma vs. Eaves*, 92 U. S., 484; *Commissioners vs. Bolles*, 94 U. S., 104; *Mercer County vs. Hacket*, 1 Wall., 83; *Anderson County Commissioners vs. Beal*, 113 U. S., 227, 238-9, and authorities there cited; *Cairo vs. Zane*, 149 U. S. 122)."

We say, therefore, that, *whatever be the conditions or circumstances* required to exist by the Code precedent to the issuance of these bonds—whether the road must have been an unfinished road at a certain time, whether the citizens of the county must have had an interest in the road, or whether the taxable property in the county must be such that a tax rate to pay the bonds would not exceed double the State tax—in short, whatever possible conditions might be required by these Code sections—the recitals in the bonds gave the purchasers thereof "the right to assume that the circumstances existed which authorized the county to exercise the authority given by the Legislature" (see *School District vs. Stone*, 106 U. S., 183, 187, quoted *supra*).

This proposition is conclusive in favor of the holders of these bonds. The act—namely, the said sections of the Code—was valid, and admitted to be valid by all Courts and all parties. Said sections gave authority under certain circumstances to issue bonds, and the recital is conclusive that those circumstances existed.

The learned counsel for the County of Stanly, in his supplementary brief filed in the Supreme Court of the United States when the Wilkes County case was heard, attempted to make the point that these bonds show on their face that the road was not begun before the adoption of the constitution of North Carolina—in 1868. He makes his argument as follows: That the bonds in the present case recite the act of March 3, 1887—namely: "An act to amend the charter of the Yadkin Railroad Company." He then makes the further proposition that the purchaser is charged with notice of the original charter of the Yadkin Railroad Company (not recited in the bond), and that, if this original charter is examined, it will be found to be Chapter 236 of the acts of 1870, which was enacted after the constitution was adopted.

This argument, however, is clearly insufficient. A purchaser of the bonds, reading the bond, would, it is true, see that the act of March 3, 1887, is recited. It would then be his duty, under the decisions of the Supreme Court of North Carolina, to examine the journals of the legislature of the State of North Carolina to see whether those journals showed that the said act was properly enacted, and, on examining such journals, he would find that it was not properly enacted. This purchaser might then drop the matter of this act to amend the charter of the Yadkin Railroad Company, and go no further on that act. He could then proceed to examine Sections 1996 *et seq.* of the Code, and it would

then be his duty to examine the journals of the legislature to see whether said sections of the Code were properly enacted. Having found that said sections were properly enacted, then he finds the recital in the bonds to be that the bonds are issued *by authority of the said sections.* Now, our proposition is that, under the repeated decisions of the Supreme Court of the United States, the purchaser of the said bonds need go no further. He need not go back and examine all the pre-existing legislation, the charter of the railroad company, the question whether the railroad had been begun before the constitution was adopted, or before April 10, 1869, when the matter which is now the Code sections was originally enacted. If he had made such inquiry he might have found that the railroad was begun before the adoption of the constitution, even although the charter of this particular railroad company had not been granted until afterwards. The decisions of the Supreme Court of North Carolina, even at their most, they do not decide that the railroad *company* which owns the railroad in respect of which the bonds are issued must have been *chartered* before the adoption of the constitution. The only requirement, at the utmost, is that the *railroad* should have been begun before the adoption of the constitution. Nothing appears on the face of these bonds, and nothing appears from the legislation therein recited, to show that the railroad in question may not have been begun long before the adoption of the constitution.

But all this, under the decision of the Supreme Court of the United States in *Evansville vs. Dennett,* is a matter which the *bona fide* purchaser of these bonds, under the recitals therein contained, need not concern himself. As soon as he has found these Sections 1996 *et seq.* of the

Code, and has found that they give authority to issue bonds under some circumstances therein mentioned, and has found from the journals that these sections of the Code were properly enacted by the legislative body, he has then a valid act, properly enacted, authorizing the issue of these bonds, and as the bonds recite that they are issued by authority of that act, this recital is conclusive in his favor.

It makes no difference in this respect that the bonds also recite the invalid act of March 3, 1887. Such was the precise fact in *Evansville vs. Dennett* with respect to the invalid act of March 11, 1867, recited in the bonds in question in the said Evansville case. The decision of the Supreme Court was to this effect, that, although this invalid act was recited, the purchaser of the bonds "had a right to assume from the recital that the prerequisites of both *the valid act* and the invalid act had been observed by the common council before the issuance of the bonds" (p. 440).

The foregoing proposition we regard as conclusive of this case in favor of the holders of the bonds. It is a proposition which is decisive of the case, and we urge it with great confidence, since it is not noticed or discussed in the opinion of the court in this case which has been already filed. Nevertheless, on this rehearing we have thought it proper to go into the case at length, and therefore we have below stated more at length the

various arguments to show that even if the county is not estopped by the recitals in the bonds, the bonds are nevertheless valid and enforceable.

II.

There was lawful authority for the issue of these bonds in the present case UNDER THE CODE, **sections 1996 to 2000. These sections of the Code were originally adopted as the act of April 10, 1869. They were afterwards adopted as sections 1996 to 2000 of the Code of North Carolina of 1883. It is admitted by all that these sections of the Code, 1996 to 2000, were adopted in accordance with the constitution as respects the three several readings and the entry of yeas and nays upon the journal, etc.**

The Supreme Court of the United States, in the *Wilkes county case*, was careful in answering the first question to say that the Federal court should follow the decisions of the state Supreme Court as controlling upon the inquiry whether legislative enactments of 1868, 1879 and 1881 were passed in such manner as to become, under the constitution, laws of the state, and thus the Supreme Court limited the effect of these decisions of the state Supreme Court to the point whether they had become laws of the state under Article II., Section 14, of the constitution. The Supreme Court of the United States, by thus carefully limiting its answer to the first question, has, in

effect, stated that these decisions of the Supreme Court of the State of North Carolina, with regard to the sections of the Code, are not to be controlling in the Federal Courts, and hence the general rule applies that the Federal Courts should either follow the decisions which were in existence when the bonds were issued, if there were any, or, if not, then they should consider the questions for themselves, and they are not controlled by any subsequent decision of the state Supreme Court. Hence, decisions of the Supreme Court of North Carolina, construing the Code made *after* the bonds in question were issued, do not bind the Federal courts, if such subsequent decisions of the Supreme Court of North Carolina are not in accordance with the general principles of jurisprudence, but the Federal courts may and should, exercise their own independent judgment. There is a long line of decisions to that effect in the Supreme Court of the United States, and these decisions relating to the construction of statutes are expressly recognized and distinguished by the Supreme Court of the United States in its opinion.

You will notice that on page 519 the Supreme Court says, referring to the acts of 1868, 1879 and 1881, as follows :

> " Observe that the issue is not as to the construction, meaning or scope of a statute, but whether that which purports to be a legislative enactment ever became a law for any purpose."

Under this decision of the Supreme Court of the United States, the Circuit Court of Appeals will, of course, no longer feel bound by the decision of the Supreme Court of North Carolina construing the Code *after* the bonds were issued.

OUR FIRST PROPOSITION *under these sections of the Code is that they are prospective in their operation, and that they are not limited to any railroad which had been begun either before the constitution of 1868 was adopted or before the adoption of these sections of the Code by the act of April 10, 1869.*

The language of section 1996 of the Code is: "The Board of Commissioners," etc., "*shall have* power to subscribe stock," etc., "to aid in the completion of any railroad in which the citizens of the county *may have* an interest." *All this is future.* It applies to any railroad in which the citizens of the county may have an interest, either when the act was adopted *or at any time afterwards.* There is nothing in this language which restricts the operation of the act either to the time of the adoption of the constitution of 1868 or to April 10, 1869, the time of the first enactment of the statute which became these provisions of the Code. Any of the recent decisions of the Supreme Court of North Carolina to the contrary are wholly indefensible, and have no support in the language of these sections of the code. Inasmuch as all of these decisions were rendered after these bonds were issued, they are not binding upon the federal courts (See *Folsom vs. Ninety-Six*, 159 U. S., 61).

These sections of the Code required an election and a vote of a majority of the qualified voters of the county in favor of the proposition of subscribing the stock and issuing the bonds. This provision was complied with in the case of this present issue of bonds. The bond recites it (Record, p. 8). The complaint in the State Court suit (Record, p. 19) alleges compliance, and the answer of the county commissioners in the State Court suit (Record, p. 25) also admits compliance with this provision of the code.

The recital in the bond is that the bond is "authorized by a majority vote of the qualified voters of Stanly county by an election regularly held for that purpose, on the 15th day of August, A. D. 1889." We are aware of the fact that the said bonds recite that they are issued by authority of the act of March 3, 1887, But the recital of the act (if that act of March 3, 1887, be held not to give authority) would not invalidate the bonds, if they were, in fact, authorized by some other act, as sections 1996 to 2000 of the Code, now under consideration. See *Anderson County vs. Beal*, 113 U. S., 227, where the wrong act was recited. In that case this Court, notwithstanding the bonds recite the wrong act, held, as respects the recital of the election, as follows, to wit (p. 239) :

"In view of all this, the statement by the commissioners in the bond that it is issued 'in pursuance to the vote of the electors of Anderson county of September 13, 1869,' is equivalent to a statement that 'the vote' was a vote lawful and regular in form, and such as the law then in force required in respect to prior notice."

See, also, *Evansville vs. Dennett* in this Brief *ante*, POINT I.

This recital, therefore, of the election in this Stanly county bond is a recital of an election under sections 1996 to 2000 of the Code, and is conclusive in favor of the *bona fide* holders of these bonds, as was held in the said case of *Anderson County vs. Beal*, *supra*.

Sections 1996 to 2000 of the Code do not violate Article 5, Sections 6 and 7, of the Constitution as to "Special purpose," "Special object" or "Special approval" of the General Assembly.

Said Sections 6 and 7, Article 5, of the Constitution are as follows:

SECTION 6. "The taxes levied by the Commissioners of the several counties for county purposes, shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly."

SECTION 7. "Every act of the General Assembly levying a tax, shall state the special object to which it is to be applied, and it shall be applied to no other purpose."

It was objected by the state court in the case of *Commissioner vs. Call*, 123 N. C., 308, and in *Commissioners of Stanly County vs. Snuggs*, 121 N. C., 394, 400, 401, cited in the *Call Case*, p. 323, that these provisions of the Code are a general act, and as such violate Article V., Section 6 and 7, of the constitution, which provides, in substance, that taxes levied by the commissioners of the several counties for county purposes shall be levied in like manner as the state tax, and shall never exceed the double of the State taxes, except for a special purpose, and with the special approval of the General Assembly, stating the special object to which the tax shall be applied.

(a) **In the present case, however, there is not a word or syllable in this record to show that the county tax necessary for these**

bonds would exceed double the state tax; therefore, the question does not arise.

(b) **If, however, it had been shown in the record in this case that the county tax for these bonds might exceed double the state tax, then these bonds are, nevertheless, valid:**

First, because the Code does not violate the provisions of Article V., Section 6 and 7, above referred to. The constitution only requires that the legislature give special approval to the special purpose for which any tax is levied in excess of the rate named, but such special approval may be given as to all the counties, as well as to any one county, the object of the provision of the constitution being to require the special assent of the legislature to the special purpose. If the rate referred to in Article V., Section 6, is to exceed the double of the state tax, this section requires the legislature to specify the special purpose for which it may so exceed the state tax. The legislature could not authorize such excess by an act, general or special, which only named county purposes generally, and did not specify the special or particular purpose, but it is not necessary that the legislature should in each instance specify by name any particular county or counties. The specification required is only a specification for a special purpose. Legislative authority to subscribe for the stock in a railroad company and issue bonds in payment of such subscription is a special purpose within the meaning of this section, and so the sections of the Code, 1996 to 2000, being the act of April 10, 1869, do specify the special purpose for which the

tax is to be levied. It is not necessary to name by name each particular county. If these sections of the code had provided that the county commissioners of the county, A, B, C, D, etc., naming all the counties in the State, should have power to subscribe for stock in any railroad company, etc., obviously this would be good, for the very Section 6, Article V., of the constitution, referred to, contemplates that such taxes may be levied by all "the several counties" of the state. The constitution does not say that any special act is required, but only requires that the purpose be specified, and that the tax and the purpose have the special approval of the General Assembly.

The proposition of the Supreme Court of North Carolina on this point seems to be, in effect, that if the legislature passes a special act for each county in the state; that is to say, ninety-five acts, each act exactly alike, except that one act applies to one county and another to another, and so on through all the ninety-five acts, the legislation is good; but if the legislature, instead of doing this, enacts precisely the same act and says that this act shall apply to all counties in the state, then such an act is bad. Such a view is, of course, unsound, and, if that be the view of the state Supreme Court, the federal courts cannot be expected to follow it as to negotiable bonds issued before such state decision was made.

But, Second, *however this point may be decided, a ruling one way or the other would not invalidate these bonds. A bond may be a valid obligation, although there there is not sufficient tax to pay it.*

Such bonds could be paid by as much tax as could be levied, and, if at any time the legislature did pass a special act giving its special approval to the levy of a

further tax, then the defect of a lack of power to tax would be removed, if such defect existed. Therefore, on this point, the objection raised by the Supreme Court of North Carolina must fall. That there may be bonds which are valid, altough there is a tax-rate limit, is well settled. See *United States vs. Macon County*, 99 U. S., 582. Article V., Section 6 of the constitution of North Carolina is a mere limitation upon the tax rate, such as was involved in this case of *United States vs. Macon County*, just cited.

FURTHERMORE, THIRD, *even if there be this tax-rate limit in Article V., Section 6 of the constitution of North Carolina, that is a mere limit. It does not appear as a matter of law on the face of the constitution, or on the face of these sections of the code, or on the face of these bonds, that in the instance of these particular bonds of Stanly county the tax-rate limit would be exceeded. Whether or not this tax-rate limit would, as a fact, be exceeded, as a matter of pais, of which the holder of a negotiable bond, like the bonds in question in the present case, is not bound to take notice* (See POINT I. of this Brief, *supra*). Moreover, as above stated, there is no proof in the prasent case that the county tax for these bonds would exceed double the state tax.

Erroneous Construction of the Word "COMPLETION" in Section 1996 of the Code, by the Supreme Court of North Carolina in its Late Decision in the *Stanly County Case*, 121 N. C., 394, 1899.

The Supreme Court of North Carolina, at this late day, in *Commissioners of Stanly County vs. Snuggs*, 121 N. C., 394, has taken a very narrow view of the word "completion." It has undertaken to say that these

sections of the Code refer only to a railroad which had been begun, and that the word "completion" is not synonymous with "construction," but that the language here requires that there must have been an unfinished road.

The court went further, and held that there must have been a road unfinished *at the time of the adoption of the constitution*, April 24, 1868, in order that these sections of the code might have application. This interpretation of the word "completion," we submit, is not the correct one.

It seems obvious that it is used as synonymous with the word "construction." This view is, we think, supported by the obvious difference between this language and the language used in the state constitution as respects the issue of state railroad aid bonds. Article V., Section 4, of the constitution prohibits the issue of State railroad aid bonds, "except to aid in the completion of such railroads as may be *unfinished at the time of the adoption of this constitution.*" Section 1996 of the Code, adopted April 10, 1869, about one year after the framing of this provision of the state constitution, omits the significant words—namely, "unfinished at the time of the adoption of this constitution." On no possible theory can these words be read into the statute. The legislature did not put them there, and the courts cannot put them there.

Erroneous Construction in the *Stanly County Case* by the State Supreme Court of the Words "any Railroad in which the Citizens of the County May Have an Interest," see said Section 1996 of the Code.

The Supreme Court of North Carolina held that the words of Section 1996 of the Code, "the citizens of

the county may have an interest," do not mean exactly what they state, but hold that they require that the county, *as a county*, shall have a *pecuniary* interest in the railroad, in order that Section 1996 may apply to it. On this point it seems only necessary to state that no such words occur in Section 1996. This construction by the Supreme Court of North Carolina takes out the words "*the citizens*" and inserts the word "*pecuniary*," and thus it holds that the words "any railroad in which the citizens of the county may have an interest" are to be construed as follows, to wit: "Any railroad in which the county has a pecuniary interest." A mere statement of such a distorted construction of this language of the code is enough to refute any such construction. Here, too, again we may call the attention of this Court to the language of Article V., Section 6, of the constitution of the state of North Carolina when it was dealing with the question of the right of the State to issue railroad aid bonds. There it refers to a railroad "in which the State has a *direct pecuniary interest.*" This section 1996 of the Code was adopted about one year after the said Article V., Section 6, of the constitution. Doubtless the legislators had before them this provision of the constitution, or, at least, were familiar with it. The difference in the language was obviously intentional and significant.

The history of the adoption of this provision of the State Constitution as to State Railroad Aid bonds shows that it had a different purpose from that of the Code (§§ 1996-2000).

What is now Section 5 of Article V. of the constitution was originally reported to the Constitutional Convention of 1868 by the committee on finance as follows:

"Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall be in the same bill levy a special tax to pay the interest annually" (Journal, p. 354).

An amendment was proposed as follows:

"And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroads and other works of internal improvement as are unfinished, and in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon" (Journal, p. 354).

This proposed amendment was further amended as follows:

"Mr. Tourgee moved to amend by striking out 'are' in the fifth line and inserting 'may be;' insert after the word 'unfinished' in the fifth line '*at the time of the adoption of this constitution.*' Strike out 'and' in the fifth line and insert 'or.' This amendment of Mr. Tourgee's was accepted, and the proposed amendment, as amended, was adopted (Journal, p. 354).

On pages 85 to 90 of the convention journal is a report made January 29th, 1868, by the Treasurer of the State to the President of the convention as follows:

"SIR—I have the honor, in response to the resolution of your honorable body requesting me to furnish the convention a 'statement of the indebtedness of the State, to what parties or sources, what amount to each, what is the amount of her indorsement for railroad or other improvements, what further indorsement of railroad bonds she is directed to make under any existing law or regulation, and, when passed, what property, or assets, or securities, said State holds for or on account of said indebtedness, what amount of stock the State

holds in the several corporations of this State, and what amount of dividend or interest she receives annually from each source.'" * * *

The report of the Treasurer shows that, prior to the meeting of the convention, the State had undertaken to issue its bonds in aid of certain railroads, and that, under the statutes then existing, the State was liable to be called upon for the issue of additional bonds, or for the guaranty and payment of additional bonds, and the State owned Stocks in certain railroads, thus having a direct pecuniary interest in them. The amendment made to Section 5, Article V., of the Constitution above quoted was designed to enable the State, *without a vote of the people*, to carry out its contracts already entered into on railroads, &c., already begun and to protect its interests in the railroads, &c. already begun. *With a vote of the people* the State was allowed to aid railroads without restriction. As the Constitution, Article VII., Section 7, did not allow counties to incur any debt in any case (except for necessary expenses) without a vote of the people, the reason for the provision as to *unfinished* railroads in case of State aid, did not apply to counties, and was purposely omitted in the Act of April 10, 1869 (now Sections 1996-2000 of the Code).

This view is supported by the following decision rendered by the North Carolina Supreme Court in 1869, the year following the Constitutional Convention.

In *Galloway vs. Chatham Railroad Company*, 63 N. C., 147, the suit was to enjoin an issue of State bonds in aid of the railroad company. The court held that the bonds were unauthorized under the provisions of the constitution. In the course of the opinion (PEARSON, C. J., giving the same) the court say, with respect to the restrictions on the power of the state to

incur debt, speaking of the debt existing at the time of the adoption of the constitution of 1868 (p. 153):

"It will be found that most of the public debt was incurred in three modes: 1st, by subscribing for stock in railroad and navigation companies, and issuing bonds to pay for the stock, the state becoming a member of the corporation; this is the heaviest item, and amounts to say eight millions of dollars; 2nd, by issuing bonds of the state and exchanging such bonds for a like amount of the bonds of the corporation, the state not becoming a stockholder and taking collateral security of more or less value; this is the next heaviest item, and amounts to about three millions of dollars; 3d, by endorsing the bonds of corporations and taking a mortgage or some other collateral security; this item amounts to about two millions.

These are the three modes by which, judging from the past, it was apprehended the public debt might be so run up as to ruin the credit of the state and tarnish her honor and her reputation for good faith.

* * * (p. 155). The suggestion that the credit of the state was given by this statute to aid in the completion on an *unfinished railroad* was not strongly urged on the argument, and indeed it could not be. An unfinished road is one that has been begun and partly worked on, and such a road is made an exception, on the ground that it might be proper to finish it in order to prevent a sacrifice of the work that had been done. There is no evidence that such was the fact in regard to this road. The other suggestion, that the state has a direct pecuniary interest in this road, was properly abandoned. The word '*has*' is in the present tense. The exception is obviously confined to roads in which the state had a direct pecuniary interest at the time of the adoption of the constitution; otherwise the state might, by a subscription for stock, become directly interested in every railroad or navigation scheme that should thereafter be projected, and thus the restrictions of the constitution would be of no effect whatever."

Note the difference between the language of the Constitution as to State aid bonds and the language of the Code as to county aid bonds. The Constitution says "*has*," and note the comments of the court on the present tense. The Code says "*may have*," &c., &c.

Of course such of these decisions of the Supreme Court of North Carolina as were rendered after the bonds in question in the present case were issued are not binding upon this Court, and it is both the right and duty of this Court to construe this language of sections 1996–2000 according to their natural and proper meaning.

Within the meaning of Section 1996 of the Code the citizens of a county have an interest in any railroad running into or through the county, and this section would be confined according to *such* railroads.

No "policy" of the State against Railroad Aid Bonds. Provision as to "unfinished" railroads applies only in case of State aid bonds.

The learned counsel for the county apparently attempts to make an argument that there was a *policy* of the State of North Carolina, as evidenced in the constitution of that state, adopted in 1868, against issuing railroad aid bonds by either the state or counties, except in aid of roads which were unfinished at the time of the adoption of the constitution. There was no such policy. The only policy was this—that no State bonds should be issued to aid any *new* railroads, unless there should be a vote of the people, but with such a vote the state could aid any railroad, whether it had been begun or not at the time of the adoption of the constitution. If the railroad had been begun and was unfinished at the time of the adoption of the constitution, state bonds might be issued in aid thereof without any vote of the people. *As to counties, there was no distinction made as to whether the road was finished or unfinished at*

the time of the adoption of the constitution. A vote of the people of the county was required for the issuance of railroad aid bonds of a county in either case, whether a road had been begun or was a new railroad, and there was absolutely no distinction whatever made in the constitution between new roads and unfinished roads so far as respects county aid, and no such distinction existed in the Code, or in any other provisions of the statute.

Even the learned counsel for the county would admit that if there had been a special act authorizing the issue of these bonds, or if the act of March 3, 1887, had been properly enacted by the legislature, there would have been clear constitutional power to issue these bonds. How, then, can the learned counsel seriously argue that the constitution of the state of North Carolina has adopted any policy as against the issue of county railroad aid bonds.

Further, as to Code Sections 1996–2000. These sections give power to issue the bonds. The objections of the County further answered.

The learned counsel for the county says, in substance, in regard to the Code provisions, Sections 1996 to 2000, originally adopted April 10, 1869, these are to be construed the same as the provisions in the constitution of the state, Article V., Section 4, in regard to the issue of railroad-aid bonds by the state, stating: "It was deemed a part of the policy of the state to place

its subdivisions under the same restrictions as the state, by preventing them from aiding in the completion of a road not then begun." There is not anything in the Code or in any of the statutes or in the Constitution of the State which supports any such view. The significant language of Article V., Section 4, of the constitution of the state, as applied to *state* railroad-aid bonds, is purposely omitted when the constitution deals with *county* bonds in Article VII., Section 7, and is purposely omitted from the said provisions of the Code. The Supreme Court of North Carolina, in *Commissioners of Stanly vs. Snuggs*, 121 N. C., 394, committed an obvious and glaring error in holding that the same provisions applied to a *county* as to the *state*.

We may note in passing that the learned counsel for the county, in dealing with Article V., Section 4, of the constitution of North Carolina in connection with his argument in respect of code sections 1996 to 2000, would omit the significant words "*a direct pecuniary*," so that he would make a clause in that section, as respects state aid, read "a railroad which may be unfinished at the time of the adoption of the constitution, or in which the state has *an interest*," whereas that section of the constitution really reads, "except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this constitution, or in which the state has a *direct pecuniary* interest, unless the subject be submitted to a direct vote of the people of the State," etc. The claim of the learned counsel—that a "direct pecuniary interest" is required in the case of *county* bonds—is erroneous, and the decision of the Supreme Court of North Carolina in the case of *Stanly County vs. Snuggs*, 121 N. C., 394, is plainly erroneous.

The learned counsel for the county speaks of the case of *Stanly County vs. Snuggs*, 121 N. C., 394, and says, in substance, that in that case the words in code section 1996, act of April 10, 1869, "in the completion of any railroad in which the citizens of the county may have an interest" were construed as speaking of railroads *unfinished* at the time of *the passage of the act or the adoption of the constitution*. The fact is, the court, in the case of *Stanly County vs. Snuggs*, held that those words in the code were retroactive and went back to the time of the adoption of the constitution (April 24, 1868), although there was not a word or syllable in the said Code, or in the act of April 10, 1869, to indicate that they were intended to have any such retroactive effect. The learned counsel continues (p. 19, bottom):

"It was deemed a part of the *policy* of the state to place its subdivisions under the same restrictions as the state, by preventing them from aiding in the completion of a road not then begun."

The fact is that there was "no policy of the state" to prevent a county from aiding in the completion of a road not begun at the time of the adoption of the constitution, or at the time of the passage of the act of April 10, 1869, nor even to prevent the state from aiding such road. The restriction was that a county should not aid any road begun, or not begun, unless by a vote of the people. The restriction on the part of the state was less than this, to wit, the state was permitted, *without* a vote of the people, to aid any railroad which had been then begun, and was permitted to aid *any* railroad (begun or not begun) *with* a vote of the people.

The learned counsel for the county would omit from his quotation of Article V., Section 4, of the constitu-

tion, the significant words "*a direct pecuniary*" [interest], which apply only to *state* railroad aid *without* a vote of the people, and then goes on seriously to argue that the same direct pecuniary interest is necessary in the case of aid by a county, although neither the code nor the constitution makes any such provision. The bare statement of such an argument is enough to refute it.

Furthermore, whether or not the railroad had been begun before April 10, 1869, or even before the adoption of the constitution (April 24, 1868), was a fact *in pais* to be determined by the county commissioners before they issued the bonds, and not a matter with which the holder of these negotiable municipal bonds is concerned.

The Code of North Carolina is one act (Code, Section 3876), and went into operation November 1st, 1883 (Code, Section 3866).

At the end of volume 2 of the Code, at bottom of page 603, *it is declared that the requirements of Sec.* 14, Article 2, of the Constitution of North Carolina, have been complied with in the passage of the Code; and this is also admitted.

It is admitted that the Board of Commissioners was proceeding under the provisions of sections 1996 and 1997 of the Code, as well as under the act of March 3, 1887. If this be true, then the bonds are valid, notwithstanding the recitals in the bonds, provided the Code provisions conferred the power to issue them on the board.

Knox. Co. vs. Ninth Nat. Bank, 147 U. S., 91.
Cairo vs. Zane, 149 U. S., 122.
Anderson, &c., vs. Beal, 113 U. S., 227.

But the respondents contend that these sections did

not authorize the issuance of the bonds for the following reasons:

I. Because said statutes are not local and special as required by sections 1, 6 and 7 of the Constitution of North Carolina.

The conclusive answer to this is that there is not a particle of evidence of any kind to be found anywhere in the record that the payment of the interest or principal of these bonds will require a county tax to exceed the double of the State tax. But, further, under the decisions of the Supreme Court of North Carolina this constitutional provision does not affect the validity of the bonds, and in no view of the case could affect more than the method of having a valid, existing and binding obligation *paid.*

"The legislative practice has uniformly been, as far as we know, to give approval in advance, and thus confer the requisite legal authority to levy special taxes beyond the assigned limits, though, if given after the levy, it would doubtless be equally effectual" *(Cromartie vs. Commissioners,* 87 N. C. Reps., on p. 140).

And in *Herring vs. Dixon,* 122 N. C., on page 423, the Supreme Court of North Carolina again distinguishes between the power to contract a valid indebtedness without special legislative sanction and the power to levy a tax to pay said indebtedness when it says: "In *Vaughn vs. Commissioners,* 117 N. C., 429, while it was held that the commissioners could *incur a debt* for necessary expenses, without a vote of the people, it was not held that they could *levy a tax* in excess of the constitutional limit to pay it without special approval of the legislature."

So under the rulings of *Cromartie vs. Commissioners* and of *Herring vs. Dixon* the commissioners have the right to contract a valid debt without a special act,

but only the process of collecting its payment would be affected by section 6, article 5, of the Constitution.

But this argument is useless, as the record contains no evidence whatever, that the payment of this obligation by the county will require a tax exceeding double the State tax.

Subscriptions to railroads, under General Statutes similar to section 1996, have been upheld by the Supreme Court of the United States :

"Where a State law confers a general power on a county to subscribe to the stock of any railroad in the State for any amount not exceeding $100,000, the county may subscribe to the stock of two railroads $100,000 each" (*Chicot County vs. Lewis*, 103 U. S., 164).

In *Davies vs. Huidekoper*, 98 U. S., 104, the court upholds a subscription under a General Statute of Missouri almost identical in language with section 1996.

Re the "interest of the citizens of the county," and "Completion" required by the Code.

In addition to what we have already said on these subjects, we add the following :

The appellants further contend "that said sections of the Code failed to authorize the issue of said bonds, because said Railroad was not, within the meaning and proper construction of section 1996 of the Code, one in which the citizens of the County of Stanly had an interest."

Aside from the common sense of the matter, the grammatical construction of section 1996 forbids the interpretation put on it by appellants ; to wit, that, before a vote could be taken by the citizens of Stanly

County, the said citizens must have a direct pecuniary interest in the road; that is, must be stockholders in the road. The words of the statutes are "in which the citizens of the county may have an interest."

The words are not "citizens of the county may have an interest," or "certain citizens," but "*the* citizens of the county."

So, if the pecuniary interest is meant, *every citizen* of the county must have stock before a county subscription could be voted, which is a *reductio ad absurdum*. But, if this was meant, the statute should have read, "in which the citizens of the county may have interests." So that, assuming that this interest means a pecuniary interest, every citizen of the county must have stock, and that stock must be "an interest," or, in other words, that stock must constitute only one interest, one block of stock, owned in joint ownership by every citizen of Stanly County—a palpable absurdity.

It is clear that the interest spoken of is the interest that the citizens of the county might have in any public improvement.

"What else does this doctrine mean, if not that building a railroad, though it be built by a private corporation, is an act done for a public use? And the reason why the use has already been held a public one is that such a road is a highway, whether made by the government itself or by the agency of corporate bodies, or even by individuals, when they obtain their power to construct it from legislative grant" *(Olcott vs. Supervisors*, 16 Wallace, 678*)*.

Re the "completion" required by the Code.

It is also objected by the attorney for the County Commissioners, "Nor was the subscription made necessary to aid in the completion of the same" [that is, the railroad].

" No reasonable construction of this act will require that the road be aided should be actually built before the county was autorized to give it aid. That theory would, no doubt, add greately to the security of the county and would relieve it from many of the perplexing questions which so commonly arise. If, however, the road were actually built, no aid would be needed in its construction. The aid might, in that event, be useful to its stockholders, or might relieve it from embarrassments, but a road which is built can neither need nor receive aid in its construction. That is a fact accomplished " *(Kennicott vs. Supervisors*, 16 Wallace, 452*)*.

Another defense has been urged in and sustained by the State Court, to wit: That the provisions of section 1996 refer to only those roads that were *unfinished in April, 1868, the time of the adoption of the constitution of 1868.*

" This reasoning leads us to the still farther conclusion that, at the time when the act 1868-9 was brought forward in the Code, Section 1996, and the four succeeding sections, it could have had reference to no cases, except those where the counties had a pecuniary interest in unfinished railroads at the adoption of the Constitution of 1868 " *(Commissioners vs. Snuggs*, 121 N. C., on page 403, 1897*)*.

This was first decided in 1897 and is one of the most astonishing legal solecisms into which so able a court ever fell. The statute of April 10th, 1869, section 1996 of Code, made no reference to the Constitution of 1868, nor to any other point of time in the past. Every word in section 1996, denoting tense, is in the future tense, and the Code went into effect November 1st, 1883.

It is an universal rule of construction that all statutes are prospective in their operation, unless the statute itself says to the contrary.

" No statute should be given a retrospective operation unless its words expressly require such construction " *(State vs. Littlefield*, 93 N. C., 614*)*.

What words in section 1996 require that its operation be referred back to April, 1868, fifteen years before it was re-enacted in the Code, and one year before it was ever put in any shape on the statute books of North Carolina? Upon the same false principle of construction (a principle that can find no support in any book ever written on the subject), if section 1996 should be re-enacted in the Code of 1900, it would have no application to any road that might be built during the next century, but would apply to roads incomplete in the year 1868, thirty-two years before its enactment! But this very principle has been passed on by the Supreme Court of the United States in *James vs. Milwaukee*, 16 Wall., 159. In that case a statute authorized a city to lend its credit to any railroad company incorporated and organized; and this court held that companies thereafter organized were intended to be included, and the statute was applicable to them, as well as those then in existence. This court said (pp. 160, 161):

"The defendant in error insists that the power conferred was confined to companies already in existence at the date of the act, and such was the opinion of the court below. We entertain a different opinion."

In that case, there was no word denoting the future tense, no "shall," as in section 1996, but the only words used were the adjectives, "incorporated and organized."

The cases relied on by the county's solicitors, concerning the power to tax, being conferred by special act, in answer to the contention on the part of complainants, that the commissioners had the power to issue the bonds under the sections of the Code, set out above, can have no application to a case of the kind at bar. The Supreme Court has said, in a late case, *City*

of Charlotte vs. E. D. Shepard & Co., 122 N. C., page 603, that "where such a corporation," speaking of a municipal corporation, "has thus acquired the right to create a debt, and issue the bonds, *this power carries with it*, the power to levy the taxes necessary to pay said bonds, and the accruing interest thereon (*Ralls vs. County Court*, 105 U. S., 733; *U. S. vs. New Orleans*, 98 U. S., 381).

These sections of the Code, 1996 and 1997, are as much the law of North Carolina as any other sections of the Code are; they are as much the law as the Constitution itself is. In the *Stanly County case*, the Circuit Court of Appeals, in 1899, held itself bound by the decision of the Supreme Court of North Carolina (*Commissioners vs. Snuggs*, 121 N. C., 401).

In the *Snuggs case* the Supreme Court of North Carolina upheld the sections of the Code referred to, deciding, however, that they did not apply, the road not being an unfinished road, and the citizens of the County not having an interest in the same.

Further as to Estoppel of the County by the recitals in the bonds.

In that case there was no pretense that any bondholder was a party, it being, as we contend, an *ex parte* proceeding. If any bondholder had been a party, the decision would have been different, because, in the body of the bonds issued by *Stanly County*, there was a recital that they were issued in pursuance of Sections 1996, &c., of the Code. This shows the corporate authorities acted with these provisions of the Code before them, and that they passed upon all questions left for their determination, as said by Justice BREWER in his opinion in *The Mercer County Case*, on page 601

of the volume 170 U. S. R. It shows these corporate authorities were acting in good faith, and wanted to perform their duty according to law.

On page 307, Vol. 87 Federal Reporter, in the case of *Township of Ninety-six vs. Folsom*, the Circuit Court of Appeals, speaking through Judge JACKSON, says:

"It will be observed, from the inspection of these bonds, that their recitals show upon the face of the bond a compliance with the law under which they were issued. The purchaser had a right to assume that all the conditions of the law were complied with authorizing the issue of the bonds. The question whether they were issued in compliance with the law was a question that properly belong to the authorities, who were authorized by the acts of the legislature to issue the bonds."

See further as to estoppel by the recitals in the bonds, POINT I., *supra*.

In support of the contention of appellees, that the decree heretofore entered be reversed, it is respectfully submitted that the Circuit Court was not bound by the decision of the Supreme Court of North Carolina, in the case of *Board of Commissioners vs. Snuggs*, 121 N. C., 394. We understand that the decision of the Supreme Court of the United States in *Board of Commissioners of Wilkes County vs. Coler*, 180 U. S., 506, is decisive of this. In that case, which was, upon a certificate from this Court, of certain questions, Justice HARLAN, in the concluding paragraph of his opinion, says:

" Nor do we deem it proper to express any opinion as to the scope and the effect upon the rights of the parties of sections 1996, 1997, 1998 and 1999 of the Code of North Carolina. The certified questions do not directly or explicitly relate to any question arising under those sections of the Code; and it is not appropriate that this court should, under the questions certified, consider and determine the entire merits of the case.

We answer the certified questions to this extent:

1. That the Circuit Court of the United States should have regarded the decisions of the Supreme Court of North Carolina in *Bank* v. *Commissioners*, *Commissioners* v. *Snuggs*, *Rodman* v. *Washington*, *Commissioners of Wilkes County* v. *Call*, and *Commissioners* v. *Payne*, above cited, as controlling upon the inquiry whether the legislative enactments of 1868, 1879 and 1881 were passed *in such manner* as to become, under the Constitution, *laws* of the State.

2. That the rights of the parties in this case are determinable by the law of the State as it was declared by the State court to be at the time the bonds here involved were made in the name of the county and put upon the market."

It will be seen that, in so far as this decision pertains and relates to this suit of *Board of Commissioners of Stanly County vs. Snuggs*, it sustains the opinion of Judge SIMONTON, delivered in support of the decree, entered in favor of Appellees, in the Circuit Court (See page 49 of the record, where opinion is printed in full).

Judge SIMONTON, in his opinion, takes the same view of the inquiry, whether the legislative enactments, other than the sections of the Code relied on by Complainants, were passed *in such manner as to become*, under the Constitution, *laws of the State*, that Judge HARLAN does, in his opinion, suggested above.

So that the decision of the Supreme Court, in the Wilkes case, fully sustains that of Judge SIMONTON as far as it goes, and, we think, it is to be gathered from the opinion of the Justice that, if the certified ques-

tions had "directly or explicitly related" to any questions arising under the Sections of the Code, the decision would have been in accordance with that of Judge SIMONTON in this case on the Circuit from which this appeal is prosecuted.

On page 519, 180 U. S. Reports, in the opinion of Justice HARLAN, is the following:

"In view of the cases determined by the highest court of North Carolina involving the precise point now under consideration, was the Circuit Court of the United States justified in holding the acts of 1868, 1878 and 1881 to be laws of the State? *Observe that the issue is not as to the construction, meaning or scope of a statute, but whether that which purports to be a legislative enactment ever became a law for any purpose.* May a Federal court disregard the decisions of the highest court of the State holding that such enactment, in the form of a statute, was never passed so as to become, under the State Constitution, a law?"

The above paragraph, from the opinion of Justice HARLAN, draws the distinction clearly and expressly between "*the issue as to the construction, meaning and scope of a statute*, and the issue, as to "*whether that which purports to be a legislative enactment ever became a law for any purpose.*" The Court holds that the decisions of the highest court of the State upon the question as to whether "an enactment, in the form of a statute, was ever passed, so as to become, under the State Constitution, a law," or not, are not to be disregarded.

The question here is not whether the sections of the Code relied on *were ever passed*, as required by the Constitution, so as to become *valid laws, statutes*, of the State, but whether the Circuit Court of the United States is bound by the "construction, meaning and scope of a statute," *passed as required by the Constitution, placed upon such statute*, by the highest court

of a State after the issue of the bonds, which holds invalid and void bonds, negotiable instruments, commercial securities, issued by Stanly County in good faith, put upon the market in due course of trade, purchased in open market, for value, the purchaser being unaware of any defect of authority or other irregularity on the part of the County, and there being nothing to excite *suspicion* of any defect or irregularity.

We submit, most respectfully, *that no decision of any court can be found*, which holds that the Circuit Court is bound by the decisions of the highest court of the State, so construing such a statute.

When these securities were issued, and sold in open market, reciting, in the body of every bond, these sections of the Code, as much a part of the law of the State as the Constitution itself, there had been no decision of the State Court construing the same; and the case of *Board of Commissioners vs. Snuggs*, 121 N. C. Reports, 394, was not decided until the fall of 1897, eight years after the sale of the bonds in question, and after the interest on the same had been paid by the County for years without a suggestion of repudiation.

It is to be noted that the Supreme Court, in the *case of Snuggs*, held that the Sections of the Code referred to were part of the Statute law of the State, in the following words:

"All the sections of the Code were enacted by having been read three several times in each House of the General Assembly, having passed three several readings on three different days in either House, the yeas and nays on the second and third readings having been entered on the journals of the Senate and House of Representatives, respectively."

Page 401, 121 N. C. Reports.

Justice MONTGOMERY, after using the language quoted in reference to the Sections of the Code, *puts a construction* upon the statutes, which, it is contended, renders the bonds issued as above set out void.

The question there is, in a case of this kind, when bonds were issued, and sold, as these bonds were, whether the construction put upon the statutes, the Code Section, by the Supreme Court of the State, is to be followed by the Circuit Court.

In the first place, what is the rule as laid down by the Supreme Court of the United States in that case, which all lawyers, all courts, recognize to be the leading case upon this subject (*Burgess vs. Seligman*, 107 U. S., 332):

"Where contracts and transactions have been entered into and rights have accrued thereon under a *particular state of the* decisions, or *where there have been no decision* of the State tribunals, the Federal Courts properly claim the right to adopt their own *interpretation of the law* applicable to the case, although *a different interpretation* may be adopted *by the State Courts*, after such rights were accrued" (Italics are ours).

Says Justice BRADLEY on the same page (33): "Federal Courts * * * exercise their own judgment * * * *always* * * * in reference to the doctrines of commercial law."

The rights of these parties are to be determined according to the doctrines of commercial law, it being well settled that the bonds in question are commercial securities, negotiable instruments.

We call the attention of the Court to the case of *Township of Pine Grove vs. Talcott*, 19 Wall., 666, 677. That case was an action in the United State Circuit Court upon coupons cut from bonds issued by that township in aid

of a railroad, *under an Act of the General Assembly of Michigan.* The plaintiff in error insisted that *several decisions of the Supreme Court of that State holding that the construction of railroads was not a public corporate purpose such as townships were authorized by the Constitution of Michigan to aid, and that such statute and the bonds issued in pursuance of it were void,* were controlling.

The Supreme Court of the United States, in declining to be bound by those decisions, said:

"It is insisted that the invalidity of the statute has been determined by two judgments of the Supreme Court of Michigan, and that we are bound to follow those adjudications. We have examined those cases with care. With all respect for the eminent tribunal by which the judgments were pronounced, we must be permitted to say that they are not satisfactory to our minds. We think the dissenting opinion in the one first decided is unanswered. Similar laws have been passed in twenty-one States. In all of them but two it is believed their validity has been sustained by the highest local courts. It is not easy to resist the force of such a current of reason and authority. The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of the States where the cases arise. It must hear and determine for itself. Here, commercial securities are involved. When the bonds were issued there had been no authoritative intimation from any quarter that such statutes were invalid. The Legislature affirmed their validity in every act by an implication equivalent in effect to an express declaration. And during the period covered by their enactment, neither of the other departments of the government of the State lifted its voice against them. The acquiescence was universal. The general understanding of the legal profession throughout the country is believed to have been that they were valid. The National Constitution forbids the States to pass laws impairing the obligation of contracts. In cases properly brought before us, that end can be accomplished unwarrantably no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the courts of the respective States, we

should abdicate the performance of one of the most important duties with which this tribunal is charged, and disappoint the wise and salutary policy of the framers of the constitution in providing for the creation of an independent federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery."

Upon this question, the above seems to us decisive. Nothing can be found, in any decisions of the Supreme Court of the United States, not in accordance with the rule in this case, and it is to be noted that Justice BRADLEY, in his opinion in *Burgess vs. Seligman*, 107 U. S., on page 34, says: "As this matter has received our special consideration, we have endeavored to * * * state our views with distinctness," &c., and he cites the above case, with a great number of others decided by that Court, all in support of the rule he laid down himself.

We have called the attention of the Court more at length to this rule of the Supreme Court of the United States defining in what cases, and to what extent, the Federal Courts will follow the decisions of the highest court of the State, for the reason that his Honor, Judge GOFF, seemed to be of opinion that this court is bound by the decisions of the State Court in the case of *Board of Commissioners vs. Snuggs*, 121 N. C. Reports, 394. Justice HARLAN, as we have pointed out in this argument, shows it is only in cases where the State Court has held an enactment *is not passed in accordance with the requirements of the Constitution*, that its decision is controlling; but *here is a construction of a valid statute recited in the bond*, which this Court is asked to follow, and we have shown it is not bound by it.

It was contended in the argument here, and upon the Circuit, that the decision in the case in *The Board*

of Commissioners vs. Snuggs, 121 N. C., is a bar, a *res adjudicata* in this court against the innocent bondholders.

In the case of *Carroll County vs. Smith*, a judgment had been given in favor of the county in a State Court, between it and certain of its bondholders, and it was *held to be no estoppel on holders of bonds who were not before the court. It has also been held that they cannot be made parties, and bound by publication made for them as unknown defendants.*

Carroll Co. vs. Smith, 111 U. S., 563.
Pana vs. Bowler, 107 U. S., 544, 545.
Brooklyn vs. Ins. Co., 99 U. S., 370.
Empire vs. Darlington, 101 U. S., 92.

We have shown that this court is not bound by this decision of the State Court, and we have also shown that the decision is no bar to these complainants.

The construction of the CODE PROVISIONS by the Supreme Court of North Carolina, made AFTER the issue of the bonds in suit, is not binding on the federal court, and the bonds in suit are valid obligations in the hands of bona fide holders.

Although we have discussed this subject in the foregoing brief to some extent, yet we are so convinced of the soundness of our view, and so solicitous that the matter shall receive the attentive and thorough consideration of this court, that we feel justified in presenting the subject in all of its aspects. Accordingly

we propose to show, in further support of complainants' contentions and petition to the Court, to reverse its former ruling, in this case, that the issue of the bonds in question is authorized under Sections 1996, 1997, &c., of the Code of North Carolina, and further that they are good and valid bonds in the hands of complainants.

The Code of North Carolina is one act (Code, Section 3876), and went into operation November 1st, 1883 (Code, Section 3866).

At the end of volume 2 of the Code, at bottom of page 603, *it is declared that the requirements of Sec.* 14, Article 2, of the Constitution of North Carolina, have been complied with in the passage of the Code; and this is also admitted.

These sections of the Code have been upheld by the Supreme Court of North Carolina, in this case of *Board of Commissioners vs. Snuggs*, in 121 N. Car., as appears in a former part of this brief, from the words copied from the decision.

The following are sections 1996 and 1997 of the Code of North Carolina:

Section 1996 of the Code of North Carolina.

"The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest."

Section 1997 of the Code of North Carolina.

"The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and, if a majority of the board shall vote for the proposition, this shall be entered upon the record, which shall show the amount proposed to be subscribed, to what

company, and whether in bonds, money or other property, and thereupon the board shall order an election, to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. And, if a majority of the qualified voters of the county shall vote in favor of the proposition, the board of county commissioners, through their chairman, shall have power to subscribe the amount of stock proposed by them and submitted to the people, subject to all the rules, regulations and restrictions of other stockholders in such company or companies. Provided, that the counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as they may think proper."

The following is a copy of the bonds issued by Stanly County (see pages 7 and 8 of printed record):

COUNTY OF STANLY SIX PER CENT. BOND.

Stanly County, State of North Carolina, is indebted to the bearer in the sum of five hundred dollars, lawful money of the United States, payable on the first day of July, A. D. one thousand nine hundred and twenty, with interest thereon from the first day of July, A. D. one thousand eight hundred and ninety, at the rate of six per cent. per annum, payable on the first day of July in each year at the First National Bank of Salisbury, North Carolina, on presentation and surrender of the respective coupons hereto attached, as they severally become due and payable. This bond is one of a series of eighty of the denomination of one thousand dollars each, and forty of the denomination of five hundred, making a total of one hundred thousand dollars, issued by authority of an Act of the General Assembly of North Carolina, ratified the third day of March, A. D. 1887, entitled "An act to amend the charter of the Yadkin Railroad Company," and of sections 1996, 1997, 1998 and 1999, of the Code of North Carolina, and authorized by a majority vote of the qualified voters of Stanly county, at an election regularly held for that purpose on the 15th day of August, A. D. 1889, duly ordered by the Board of Commissioners of Stanly county.

This series of bonds is issued to pay the subscription of one hundred thousand dollars made by Stanly county

to the capital stock of the said railroad, known as "The Yadkin Railroad Company." Stanly county reserves the privilege of paying the principal and interest of any or all of this series of bonds at any time after the expiration of ten years, upon the Board of Commissioners of said county first giving three months' notice of such payment in some newspaper published in said county, when such bonds shall be paid, according to number, beginning with number one.

In testimony whereof, the chairman of the Board of County Commissioners of Stanly county hath hereunto subscribed his name, for and on behalf of said Board, and the Clerk of the Superior Court of Stanly county hath countersigned the same and affixed thereto the seal of said Superior Court, this first day of July, A. D. one thousand eight hundred and ninety.

_____

Chairman.

Countersigned :

As before remarked, from our understanding of the opinion of his Honor, Judge GOFF, in this case, it is based upon the view of the court that it is bound by the decision of the Supreme Court in the case of *Board of Commissioners vs. Snuggs*, 121 N. C., 394, in its construction of sections 1996, 1997, 2000, which sections are among the recitals in the bonds in question. It should be remembered that, in the above case, *no bondholder was a party*, and the decision is put upon the distinct ground that the sections of the code relied on do not apply, and do not confer the power upon the corporate authorities to issue such bonds *for the sole reason that it is not shown* the citizens of the county had an interest in the bonds and that the road was an unfinished railroad.

At this point, we call the attention of the Court to the case of *Louisville, &c., Ry. Co. vs. Louisville Trust Company*, 174 U. S. R., on pages 573 and 574. Justice GRAY says :

"In *Merchants' Bank vs. State Bank*, 10 Wall., 604, this court stated as an axiomatic principle in the law of corporations this proposition: 'Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them.' (10 Wall., 644, 645). The proposition was supported by citations of many English and American cases, and among them *Royal British Bank vs. Turquand* (1856), 6 El. & Bl., 327. And the justices of this court, while differing among themselves in the application of the principle to municipal bonds, have always treated *Royal British Bank vs. Turquand* as well decided upon its facts. *Knox County vs. Aspinwall*, 21 Howard, 539, 545; *Moran vs. Miami County*, 2 Black, 722, 724; *Gelpcke vs. Dubuque*, 1 Wall., 175, 203; *St. Joseph vs. Rogers*, 16 Wall., 644, 666; *Humboldt vs. Long*, 92 U. S., 642, 650. And see *Zabriskie vs. Cleveland, Columbus and Cincinnati Railroad*, 23 Howard, 381, above cited."

The cases cited by Justice GRAY in the above paragraph are decided upon *municipal bonds*, and show that the principle he states applies to *contracts with municipal, as well as to other corporations;* and the late Justice MILLER, in his dissenting opinion, in the case of *Humboldt Township vs. Long*, 92 U. S. R., pages 650 and 651, says the case of *Knox County vs. Aspinwall*, 21 Howard, 539, the original case on which the rule and principles are based, is itself based upon *The Royal British Bank vs. Turquand.*

We state the above principle at this point in the argument to give emphasis to the rule that this court will so construe the *statutes* authorizing the issue of the bonds, as to uphold the validity of the same, pur-

chased in good faith, as they were, *if it can do so, under any circumstances.*"

It should be noted, and we beg the Court's special attention to the fact, that the complainants are the owners of these bonds, the innocent purchasers of the same, in open market, from these corporate authorities, sold in good faith and bought in good faith for the highest market price, in cash, and that the railroad was built, according to contract, with no suggestion from anybody, of fraud or unfairness by any one.

As this court is not bound by the construction put upon the statutes by the Supreme Court of North Carolina, what construction will it put upon them? We submit, *that one* which will uphold the bonds, issued as these bonds were, because the rule is, if, "*under any circumstances,*" they can be upheld, the Court will do it.

If an innocent bondholder had been a party to the suit in the State court, the decision, we must assume, in the *Snuggs* case, would have been in his favor *unless the court had overruled the leading and most important case upon municipal bonds ever decided in North Carolina.*

The Supreme Court in *Belo vs. Commissioners*, 76 N. C. R., 489, the leading case upon the subject of municipal bonds and the *effect of recitals in the bonds*, lays down the law as follows:

"While the decisions are very uniform that the record of the justice's court, affirming the fact of compliance with the conditions precedent to the subscription of stock is conclusive and estops the county from denying the validity of the bonds in the hands of a *bona fide* holder before maturity, *they are equally uniform in giving the same effect to the recitals in the bonds themselves*, that they had been issued in pursuance of the law which authorized their issue. The *recital is a determination of the question, and the holder has a right to rely on it (Town of Coloma vs. Evans*, 92

U. S., 484; *Knox County vs. Aspinwall*, 21 Howard, 539). Mr. Justice GRAY says: 'In the leading case of *Knox Co. vs. Aspinwall* the decision was rested upon two grounds. One of them was that the mere issue of the bonds containing a recital that they were issued in pursuance of the Legislative act was a sufficient basis for the assumption by the purchaser that the conditions on which the county was authorized to issue them had been complied with, and it was said the purchaser was not bound to look further for evidence of such compliance, though the recital did not affirm it. This position was supported by reference to the *Royal British Bank vs. Turquand*, 6 Ellis and Blackburn, in a case in the Exchequer Chamber, which fully sustains it."

The foregoing, as your petitioners aver, are the words of Justice BYNUM in a decision which has *never been departed from*. Here the Supreme Court in 1877, approved of the doctrine in the *Royal British Bank case*, upon which *Knox vs. Aspinwall* was based.

If a bondholder had been a party to the case of *Board vs. Snuggs*, it is not to be supposed that the court would have decided the case as it did. They could not without overruling *Belo vs. Commissioners*. Whether the citizens had an interest in the railroad, and whether the railroad was finished, were matters to be passed on by somebody. There was no one else to pass upon them but the board of commissioners, named in the sections. As your petitioners aver, these were conditions, and it was not for the bondholder to come and ascertain whether they are complied with or not. All he had to do was to look to the *recitals* in the bonds.

Even in the Oxford case, *Bank vs. Commissioners of Oxford*, 116 North Carolina Rep., on page 368, the first time it was before the Court, February Term, 1895, the Court say, *there being no dissent:*

"The purchaser of such coupons as those sued upon must so far act upon the notice contained in the

recitals, as a general rule, as to examine *the statutes referred to,* and ascertain, at his peril, whether the essential prerequisites to the validity of the bonds have been met, both by Legislative and popular action. *We hold that, upon a fair construction of the organic law and pertinent statutes, and their application to the facts of this case,* there *has been a sufficient compliance with the essential requirements of the law to render the election valid. We think, therefore, that the Court erred in holding that the plaintiff* was not entitled to recover, and the judgment of non-suit must be set aside and a new trial granted."

The recitals in the bonds in question, as they appear on a former page of this brief, are :

" This bond is one of a series of eighty of the denomination of one thousand dollars each, and forty of the denomination of five hundred, issued by authority of an act of the General Assembly of North Carolina, ratified the third day of March, A. D. 1887, entitled, an ' Act to amend the Charter of the Yadkin Railroad Company,' *and of Sections 1996, 1997, 1998 and 1999 of the Code of North Carolina,* and authorized by a majority of the qualified voters of Stanly County, at an election held for that purpose, on the 15th day of August, 1889, duly ordered by the Board of Commissioners of Stanly County."

Under the decision in the Belo case, and the rule, to which the Court calls attention, in the Bank vs. Commissioners, both referred to above, the purchaser of the bonds " *had only to examine the statutes referred to,* and ascertain at his peril whether the essential prerequisites to the validity of the bonds have been met, both by Legislative and popular action."

These sections of the Code, recited in the bond, as authority for their issue, were passed by the Legislature, according to the Constitution, and there is no doubt but that there was a large majority of the votes of the County of Stanly in favor of the issue of the bonds. These things are admitted. So that the bondholder

has done all he was required to do to protect himself in the purchase of his bond.

Justice GRAY says :

" In the leading case of *Knox County vs. Aspinwall*, 21 Howard, a municipal bond case, the decision was rested upon two grounds ; one of them was that the mere issue of the bonds, containing a recital that they were issued under the Legislative Act, was a sufficient basis for the assumption *by the purchaser* that the conditions on which the County was authorized to issue them had been complied with, and it was said the purchaser was not bound to look further for evidence of such compliance, *though the recital did not affirm it.*"

These are the words of Justice GRAY, quoted in the *Belo case* by Justice BYNUM, in his opinion, as we say, in the leading case in North Carolina on municipal bonds.

Now, to apply these rules to the case at bar, what were the conditions on which the County of Stanly was authorized to issue the bonds ? One was, *when necessary to aid in the completion of any railroad*, and another was, " *of any railroad in which the citizens of the County may have an interest.*"

Here was a power, legislative in its character, recited in the bond, to be exercised under certain conditions. By whom ? The Act says the " Board of Commissioners." When the Board proceeded to act, the following order was entered, in June, 1889, on the record of the proceedings of the Board (Record, p. 22).

June Term, 1889.

Ordered, that the following proposition presented by Mr. Tho. F. Kluttz, of Salisbury, President of the Yadkin Railroad Company, be accepted. The president and board of directors of the Yadkin Railroad Company having applied to the Board of Commissioners of Stanly county to make a subscription of one hundred thousand dollars to the capital stock of the

said railroad company, and said application having been considered by the board, *and it appearing that the citizens of said county have an interest in said railroad*, it is hereby resolved and ordered by the board that the county of Stanly shall subscribe said amount of one hundred thousand dollars to the capital stock of said Yadkin Railroad Company, upon the following terms and conditions:

Said subscription shall be one hundred thousand dollars, payable in bonds of Stanly county, in denominations of five hundred and one thousand dollars each, bearing six per cent. interest per annum from the date of the delivery of said bonds to said company, the interest to be payable annually on the 1st day of July in each year; said bonds shall be deposited with the First National Bank of Salisbury, N. C., on the first day of October, 1889, or as soon thereafter as practicable, the bank to hold them and deliver the same to the said railroad company as hereinafter provided. Said bonds shall run for 30 years, with the privilege of paying the principal and interest of any or all of them at any time after the expiration of ten years, upon the Board of Commissioners of said county first giving three months notice of such payment in a newspaper published in said county, when said bonds shall be paid according to the number, beginning with No. 1, and as bonds are delivered capital stock of said company in like sum to be delivered to the county of Stanly.

An election is hereby ordered to be held at the usual voting places in Stanly county on Thursday, August 15, 1889, for the purpose of enabling the qualified voters of said county to vote for or against the said proposed subscription, those voting for said subscription shall vote a printed or written ticket with the word "Subscription," thereupon, and those voting against said subscription shall vote a printed or written ticket with the word "No Subscription" thereupon, and said election shall be held in accordance with section 1998 of the Code of North Carolina, and due notice of said election shall be given in accordance with law.

If the proposition to vote said subscription shall be ratified by a majority of the qualified voters of said county at said election, then said bonds shall be delivered to said Yadkin Railroad Company, as follows: Twenty-five thousand dollars when ten miles of said road is constructed and in operation from the Rowan county line into said county of Stanly; twenty-five thousand dollars more when said road is con-

structed and in operation from the town of Salisbury to the town of Albermarle, and the remaining fifty thousand dollars when said road is constructed and in operation from the town of Salisbury to the village of Norwood, in Stanly county ; provided, that the said railroad company shall be required to begin the construction of said road at Salisbury within ninety days from and after the first day of October, 1889, and to complete the same to Norwood within eighteen months thereafter, and if not so begun and completed, then said bonds shall not be delivered to said company ; provided, however, that the Board of Commissioners of Stanly county shall have full power and discretion to extend the time for the performance of the conditions and limitations hereinbefore mentioned.

Said railroad shall be of the standard gauge.

It is hereby ordered that an entirely new registration of voters be made for said election as provided by law."

It appears, from the above, that it appeared to the Board and it was accepted, "that the citizens of said County *have an interest in said railroad.*" There *was a railroad*, and the citizens of the County had an *interest* in it.

These were the conditions to be complied with, and some one, some authority, had to pass upon the same. It was not for the innocent purchaser of the bond to inquire as to whether the conditions were complied with, *but for the municipal authorities*, who put it upon the market, and the recital in the bond that it was issued in pursuance of the power conferred by the Sections of the Code "was a sufficient basis for the assumption by the purchaser that the conditions on which the County was authorized to issue them had been complied with" *(Belo's case, supra).*

In the argument of this case, at the last term of the Circuit Court of Appeals, we were asked by the Court if we meant to maintain that the sovereign people of the County could be estopped? *We maintain here, as we*

did there, that the *Belo case expressly so decided* in the following words:

"While the decisions are uniform that the record of the justice's court affirming the fact of compliance with the conditions precedent to the subscription of stock is conclusive and *estops the County* from denying the validity of the bonds in the hands of a *bona fide* holder, they are equally uniform in giving *the same effect to the recitals in the bonds, that they had been issued in pursuance of the law which authorized their issue*"—in this case, *the Sections of the Code recited in the bond.*

We maintain that no case can be found which holds that a municipality cannot be estopped, indeed, *all the bond cases* are decided upon that assumption.

The record of the proceedings had before the Board of Commissioners of Stanly County, printed in this brief, shows that the corporate authorities acted with the sections of the Code, recited in the face of the bond, before them, and that they passed upon all questions left for their deteimination, as said by Justice BREWER in his opinion in *The Mercer County Case*, on page 601 of the volume 170 U. S. R. It shows these corporate authorities were acting in good faith, and wanted to perform their duty according to law.

On page 307, Vol. 87, Federal Reporter, in the case of *Township of Ninety-six vs. Folsom*, the Circuit Court of Appeals, speaking through Judge JACKSON, says:

"It will be observed, from the inspection of these bonds, that their recitals show upon the face of the bond a compliance with the law under which they were issued. The purchaser had a right to assume that all the conditons of the law were complied with, authorizing the issue of the bonds. *The question whether they were issued in compliance with the law was a question that properly belonged to the authorities, who were authorized by the acts of the legislature to issue the bonds.*"

Purchasing these bonds, with the recitals they contained, was it required of the purchasers to find out whether the citizens of the county of Stanly had an interest in the railroad? Was it required of them to find out whether the railroad was completed or uncompleted? These were matters for the *corporate authorities*, and for them alone. Says Justice BREWER, in *Provident Trust Company vs. Mercer County*, 170 U. S. R., page 601:

"By a long series of decisions such recitals are held conclusive, in favor of a *bona fide* holder of bonds, that precedent conditions, prescribed by statute and subject to the determination of those county officers, have been fully complied with."

In the case of *Provident Trust Co vs. Mercer Co.*, 170 U. S., 601, it will be seen that the recitals in the bond, which is printed in the volume, are similar to those in the Stanly bonds. The *Mercer County case* is decisive in favor of the complainants.

See, also, the recent case of *Gunnison County Commissioners vs. Rollins*, 173 U. S., 255, as to recitals in bonds.

But the respondents contend that these sections did not authorize the issuance of the bonds for the following reasons:

"Because said statutes are not local and special as required by sections 1, 6 and 7 of the Constitution of North Carolina."

The conclusive answer to this is that there is not a particle of evidence of any kind to be found anywhere in the record that the payment of the interest or principle of these bonds will require a county tax to exceed the double of the State tax.

But, further, under the decisions of the Supreme Court, of North Carolina this constitutional provision does not affect the validity of the bonds, and in no view of the case could affect more than the method of having a valid, existing and binding obligation *paid.*

"The legislative practice has uniformly been, as far as we know, to give approval in advance, and thus confer the requisite legal authority to levy special taxes beyond the assigned limits, though, if given after the levy, it would doubtless be equally effectual" *(Cromartie vs. Commissioners*, 87 N. C. Reps., on p. 140*)*.

And in *Herring vs. Dixon*, 122 N. C., on page 423, the Supreme Court of North Carolina again distinguishes between the power to contract a valid indebtedness without special legislative sanction and the power to levy a tax to pay said indebtedness when it says:

"In *Vaughn vs Commissioners*, 117 N. C., 429, while it was held that the commissioners could *incur a debt* for necessary expenses, without a vote of the people, it was not held that they could *levy a tax* in excess of the constitutional limit to pay it without special approval of the legislature."

So under the rulings of *Cromartie vs. Commissioners* and of *Herring vs. Dixon* the commissioners have the right to contract a valid debt without a special act, but only the process of collecting its payment would be affected by section 6, article 5, of the Constitution.

But this argument is useless, as the record contains no evidence whatever that the payment of this obligation by the county will require a tax exceeding double the State tax.

Subscriptions to railroads, under General Statutes similar to section 1996, have been upheld by the Supreme Court of the United States:

"Where a State law confers a general power on a county to subscribe to the stock of any railroad in the

State for any amount not exceeding $100,000, the county may subscribe to the stock of two railroads $100,000 each " *(Chicot County vs. Lewis*, 103, U. S., 164*)*.

In *Davies vs. Huidekoper*, 98 U. S., 104, the court upholds a subscription under a General Statute of Missouri almost identical in language with section 1996.

Another defense has been urged in and sustained by the State Court, to wit: That the provisions of section 1996 refer to only these roads that were *unfinished in April, 1868, the time of the adoption of the constitution of 1868.*

" This reasoning leads us to the still farther conclusion that, at the time when the act of 1868-9 was brought forward in the Code, section 1996, and the four succeeding sections, it could have had reference to no cases, except those where the counties had a pecuniary interest in unfinished railroads at the adoption of the Constitution of 1868 " *(Commissioners. vs Snuggs*, 121 N. C., on page 403, 1897*)*.

This was first decided in 1897 and is one of the most astonishing legal solecisms into which so able a court ever fell. The statute of April 10th, 1869, section 1996 of Code, made no reference to the Constitution of 1868, nor to any other point of time in the past. Every word in section 1996, denoting tense, is in the *future tense*, and the Code went into effect November 1st, 1883.

It is an universal rule of construction that all statutes are prospective in their operation, unless the statute itself says to the contrary.

" No statute should be given a retrospective operation, unless its words expressly require such construction *(State vs. Littlefield*, 93 N. C., 614*)*.

What words in section 1996 require that its operation be referred back to April, 1868, fifteen year be-

fore it was re-enacted in the Code, and one year before it was ever put in any shape on the statute books of North Carolina? Upon the same false principle of construction (a principle that can find no support in any book ever written on the subject), if section 1996 should be re-enacted in the code of 1900, it would have no application to any road that might be built during the next century, but would apply to roads incomplete in the year 1868, thirty-two years before its enactment! But this very principle has been passed on by the Supreme Court of the United States in *James vs. Milwaukee*, 16 Wall., 159. In that case a statute authorized a city to lend its credit *to any railroad company incorporated and organized;* and the court held that *companies thereafter organized* were intended to be included, and the statute was applicable to *them*, as well as *those then in existence.* The court said (pp. 160, 161):

"The defendant in error insists that the power conferred was confined to companies already in existence at the date of the act, and such was the opinion of the court below. *We entertain a different opinion.*"

In that case, there was no word denoting the future tense, no "shall," as in section 1996, but the only words used were the adjectives, "incorporated and organized."

The cases relied on by the county's solicitors, concerning the power to tax, being conferred by special act, in answer to the contention on the part of complainants, that the commissioners had the power to issue the bonds under the sections of the Code, set out above, can have no application to a case of the kind at bar. The Supreme Court has said, in a late case, *City of Charlotte vs. E. D. Shepard & Co.*, 122 N. C., page

603, that " where such a corporation," speaking of a municipal corporation, " has thus acquired the right to create a debt, and issue the bonds, *this power carries with it*, the power to levy the taxes necessary to pay said bonds, and the accruing interest thereon " *(Ralls vs. County Court*, 105 U. S., 733; *U. S. vs. New Orleans*, 98 U. S., 381*)*.

These sections of the Code, 1996 and 1997, are as much the law of North Carolina as any other sections of the Code are ; they are as much the law as the Constitution itself is.

In the *Charlotte* (North Carolina) *Daily Observer*, February 3, 1898, is an able article by LINDSAY PATTERSON, Esq., entitled " Stanly County Bond Case, in which he attacks and demolishes the doctrine of the Supreme Court of North Carolina that the act of April 10, 1869, Code, sections 1996 to 2000, authorized the issue of County bonds only in cases where the railroad in question had been begun before the adoption of the constitution in 1868. The same writer shows that is also true that in order that these sections of the Code authorize the issue of bonds, the railroad need not have been begun before April 10, 1869, when the matter of these sections was first enacted. We reprint the said article substantially in full as an Appendix to this brief, and submit to the respectful consideration of this court that the conclusions therein stated and the argument in support thereof are sound. We

adopt these as our own, and make them part of this brief. We can see no escape from them.

The decree of the Circuit Court should for the foregoing reasons be affirmed.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
CHARLES PRICE,
Of Counsel for Appellees.

APPENDIX TO BRIEF.

Argument and Views of Lindsay Patterson, Esq.

STANLEY COUNTY BOND CASE.

DECISION OF THE SUPREME COURT.

A Review of a Case That Embodies Principles of Far-Reaching and Dangerous Effects. If the Decision Stands It will Destroy the Fundamental Principles of Popular Government. The Courts Can Construe Statutes, But Have No Right to Radically Change Them.

TO THE EDITOR OF THE "OBSERVER":

The decision of the Supreme Court of North Carolina, which holds that the ratification of an act of the General Assembly can be inquired into in a collateral way, seems to be sustained by a long array of authorities, although there are decisions of the highest Courts in some of the States that hold the opposite. But whether sustained by the weight of authority or not, which matter is not germane to the present discussion, the principle on this point, as enunciated in the case of the town of Oxford and in the Stanly county case, must be accepted as the law in this State until it is changed by this or some subsequent court.

But the decision in the Stanly county case embodies principles much more far-reaching and dangerous in their effects than the mere declaration that the Supreme Court has a right to inquire whether the constitutional provisions have been complied with in the passage of an act by the General Assembly.

It was admitted that The Code was properly passed, and so, even, if the special acts incorporating railroad companies are not properly passed, my position is that

the issuance of bonds by the counties is valid under sections 1996 to 2000 of The Code.

The attempted repudiation of hundred of thousands of dollars of honest debts by certain counties of the State has aroused public sentiment, and very rightly; for every citizen in the State has an interest in the matter, and many citizens of the State have direct pecuniary interest in it.

The constitution of 1868 was ratified in April, 1868. Article V, section 5, thereof, reads as follows: "And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this constitution or in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon."

Twelve months thereafter, on April the 10th, 1869, the General Assembly, composed of a different body of men, passed an act, the first section of which reads as follows:

SECTION 1. "The General Assembly of North Carolina do enact: That the county commissioners of the several counties in this State shall have power to subscribe stock to any railroad company or companies, when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest."

The other sections refer to the manner in which the elections shall be held and to other matters. There is absolutely no reference in the act to the constitution. It is not mentioned. The act has no more reference to the constitution of 1868 than it has to the constitution of the United States, adopted one hundred years ago. This act of the General Assembly was never repealed but was brought forward as sections 66 to 70 of chapter 99 of *Battle's Revisal*, in the following language: Section 66: "The county commissioners of the several counties in this State shall have power to subscribe stock to any railroad company or companies, when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest." And this enactment went into effect January 1st, 1874.

It was again brought forward as sections 1996 to 2000 of The Code and went into effect November 1st, 1883, in the following language: Section 1996. "The boards of commissioners of the several counties shall

have power to subscribe stock to any railway company or companies, when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest." And there has not been a day since April 10, 1869, that this statute has not been a living, vital statute of the State. Three General Assemblies of the State thus passed on it and saw no need of clearing up any ambiguities in it.

These Assemblies in substance said :

" We say what we mean and mean what we say."

These General Assemblies knew the condition of affairs in 1869, and in 1873, and in 1883, just as well, if not better, than those of the present generation. What does the Supreme Court say about these sections in The Code. It says : " This reasoning leads us to the still further conclusion that at the time when the act of 1868 and 1869 was brought forward in The Code, section 1996, and the four succeeding sections, it could have had reference to no cases except those where the counties had a pecuniary interest in unfinished railroads at the adoption of the constitution of 1868, and that therefore The Code sections could not apply to the present case, because the Yadkin Railroad was not begun to be constructed until about 1889."

This conclusion, as I contend, is absolutely unwarranted and is against every known principle of statuetory construction. So this statute is in effect reenacted by the Supreme Court and made to read as follows :

" The boards of commissioners of certain counties shall have power to subscribe stock to any railroad company or companies, when necessary to aid in the completion of any railroad in which the county had a pecuniary interest at the time of the adoption of the constitution of 1868."

Now, this conclusion of the court necessarily involves three propositions, none of which can be sustained.

FIRST. That the statute of April, 1869, was retroactive in its effect and acted back twelve months to the time of the adoption of the constitution. The statute reads : " The county commissioners of the several counties shall have power to subscribe stock." There is absolutely no reference to the constitution in this act. The words of the act are prospective, and it is a universal principle of construction that all statutes shall be prospective in their operation and not retrospective, unless the statute itself expressly says to the contrary.

SECOND. This holding or conclusion necessarily involves the denial of the right of the General Assembly to bring forward or re-enact a statute that has for many years been on the statute books. This statute was as much re-enacted by Battle's Revisal, and again by the Code of 1883, as if it had never before been on the statute books of the State. There has not been a day since April 10th, 1869, when it has not been a living, vital statute, and I contend, if work should begin on any railroad in the State to-day, that under this statute, the county could on to-morrow, vote a subscription, under section 1996 of The Code. The very words of the statute look to the future; and, if they did not, every rule of construction would make them apply to any unfinished road in the future.

Battle's Revisal and the Code of 1883 provide that all public acts not therein included are repealed; but, if this construction stands, then the re-enactment of said statute in the Revisal and The Code amount to nothing, and, whether left out or put in these Codes, the act is repealed anyhow.

THIRD. This conclusion involves the further proposition that our Supreme Court can make a law as well as construe one already made. The Court strikes out the words "citizens of the county, and inserts in lieu thereof the word "county." It interpolates the word "pecuniary" before the word "interest," and adds the words "at the time of the adoption of the constitution of 1868."

This stretch of judicial power cannot be sustained. Under our form of government, the courts can construe statutes, but they have no right to radically change them.

Justice RODMAN lays down the true rule when he says: "But to add limiting or qualifying words is not in general permissible, or except for very strong reasons when the words used contained an intelligible description of the object." Now here is a statute as plain as it can be made. There is no confusion in its words; no ambiguity in its meaning. It is a plain, lucid statute. What right has the court to change it? It is contended that because the constitution, in speaking about the powers of the State in lending its credit, used the words "direct pecuniary interest," and "at the time of the adoption of this constitution," it must follow that these words must be put into this statute.

It is admitted that the convention intended to insert the words into the constitution, and this intent was made manifest by the convention's taking pains to in-

sert them. But it is equally clear that the General Assembly in April, 1869, intended not to insert them, for it took pains to leave them out. Two other General Assemblies took pains to leave them out, but the highest court says that they must go in. What was the necessity of putting them in? No known rule of construction required it or even allowed it. In the brief of the counsel for Stanly county is found this language: "It is also referred to to emphasize what has already been insisted upon, that the constitutional provision of 1868, and the acts of 1868-9 (sections 1996 *et seq.*), were only intended to apply to railroads existing at that date, in view of the extraordinary conditions of that period. They were left in the constitution of 1875 and brought forward in The Code evidently by inadvertence."

The mere statement of such a proposition so appals the intellect that its scope cannot be at once comprehended. The court does not adopt this principle in so many words, but it does in substance, when it says, "It could have had reference to no cases except those where the counties had a pecuniary interest in unfinished railroads at the adoption of the constitution of 1868," and so this section 1996 is meaningless—inserted by inadvertence.

If the courts of our State have the constitutional power to say statutes are left in our Code by inadvertence, it has no equal power to say, as the counsel contended above, that provisions in the constitution of the State were inserted by inadvertence, and an equal power to say that provisions were left out by inadvertence, and an equal power to say that the entire body of the constitution and statutory law of the State is a mere inadvertence. And thus popular government, as it has heretofore been understood, ceases.

But section 1996 itself contains the strongest proof that it was not inserted in the Code of 1883 by inadvertence, but that it was inserted designedly.

Section 1 of the original act and section 66 of Battle's Revisal read: "The county commissioners of the several counties in this State shall have power," etc. But, when The Code commissioners and the General Assemby of 1883 came to insert this provision in The Code of 1883, they made section 1996 read as follows: "The board of commissioners of the several counties shall have power, etc." Section 705 of The Code provides: "All actions or proceedings by or against a county in its corporate capacity shall be in the name of the board of commissioners of the county. So that,

so careful was the General Assembly of 1883 to give to this statute a present and future vitality, that it takes pains to change "The county commissioners" to "The boards of commissioners," a more correctly legal and technical expression. And it further drops out the words "in this State," all of which shows that the former statute underwent a searching examination.

By its insertion in this Code, this section took effect on November 1st, 1883, and, being prospective in all of its terms, it is in force to-day, and will so remain until repealed, giving a present power to any county of the State to subscribe stock to any railroad unfinished at the time of the subscription. But it can easily be shown that the construction put on this section 1996 by the court is wrong, when tested by every rule of law and of grammar.

It is an established rule of law that, when there is any doubt about the meaning of a statute, resort can be had to the title. The title to the act of April 10th, 1869, now section 1996 of The Code, is as follows:

"An act to authorize the several counties of the State to take stock in railroad companies," making it plain that this is a general act to apply to all counties of the State. Had it meant to limit the provision to those counties which already had stock in the roads to be completed, it would have said "an act to authorize certain counties," and section two of the act, now section 1997 of The Code, reads: "The commissioners of any county." If the view of the court is correct it should read "of any such county."

And section 1996 further says: "in which the citizens of the county may have an interest." If the court must interpolate the word "pecuniary" before "interest," then the logical result is that every citizen of the county must have stock in the road before a subscription can be voted, for it does not say: "in which certain citizens or in which citizens may have an interest," but "in which the citizens of the county may have an interest." But if this is meant, and a pecuniary interest is meant, then the statute should read "in which the citizens of the county may have interests;" for it is not to be supposed that all the citizens of a county could own a block of railroad stock in joint ownership." And the statute reads, "may have an interest," the constitution says in which the State "has a direct pecuniary interest." "May have" evidently refers to the future, yet the illogical position is taken that before a county can subscribe stock to a railroad company the county must already have had in-

vested in stock in the road with the loose surplus that so many counties of the State had at the close of the war, and now have. How did counties then, and how do they now, have pecuniary interests in railroad companies? By voting bonds and taking stock, not by making an independent investment in the stock first, and then voting bonds. But it is said that this construction is necessary in view of the extraordinary conditions of the period of 1868–9.

Were there not as many unfinished roads in the State in 1873 and 1883 as in 1868, and are there not as many or more in the year 1897? In its definition of the word completion the Court says: "We cannot see why the word completion should be thought to have been used by the legislators in any other sense than the one most usual and natural." But when the Court comes to define the word "interest" it abandons the most usual and natural sense and interpolates the word "pecuniary" before it, and gives it an unusual and unnatural meaning. Why did the framers of the constitution take pains to use the words "direct pecuniary interest?" Because they knew the use of the word "interest" alone carried with it a meaning broader than they intended. And what is the result of this faulty and illogical course of reasoning? Hundreds of thousands of dollars are repudiated, deserving persons are impoverished, the good name of the State is lost. I do not believe this reasoning can stand the test of time. I am further led to this conclusion by the fact that this construction of section 1996 is not adverted to in the concurring opinions of Justices CLARK and FURCHES, nor in the dissenting opinion of Chief-Justice FAIRCLOTH.

These bonds were in the hands of innocent purchasers before this change in the statute. It seems to involve such a change in the statute as to impair the obligations of a contract, and the Supreme Court of the United States has decided that the constitutional provision against the enactment of such laws by States applies also to an impairment by State judicial decisions. If this case ever reaches this highest judicial tribunal, it can well repeat the words used by it in a well-known case, involving the validity of municipal bonds:

"We shall never immolate truth, justice and the law because a State tribunal has erected the altar and declared [decreed] the sacrifice."

LINDSAY PATTERSON.